

Issue: Group III Written Notice with Termination (falsifying records); Hearing Date: 12/14/17; Decision Issued: 01/31/18; Agency: DOC; AHO: Lorin A. Costanzo, Esq.; Case No. 11050; Outcome: No Relief – Agency Upheld.

**COMMONWEALTH OF VIRGINIA
DEPARTMENT OF HUMAN RESOURCE MANAGEMENT
OFFICE OF EQUAL EMPLOYMENT and DISPUTE RESOLUTION**

DECISION OF HEARING OFFICER

In the matter of: Grievance Case No. 11050

Hearing Date: December 14, 2017

Decision Issued: January 31, 2018

PROCEDURAL HISTORY

Grievant was issued a Group III Written Notice with termination on May 16, 2017 for falsification of records (Written Notice Offense Code 74). On June 8, 2017 Grievant grieved issuance of the Group III Written Notice with termination. Matters were qualified for hearing and, on June 28, 2017, undersigned was appointed Hearing Officer.¹

5/16/17:

On May 16, 2017 Agency gave Grievant a copy of his Written Notice consisting of one page with the Offense date indicated as May 5, 2017. However, Agency later indicated, due to clerical error, the Written Notice should have consisted of three pages, the Written Notice form page, a list of offence codes page, and a narrative of the offense page which addressed offense dates in addition to 5/5/17. Approximately three weeks after Grievant received the one page Written Notice form Agency transmitted to Grievant the Written Notice form, previously given him, together with a two page attachment which Agency contended were left off in clerical error.²

Grievant moved the Hearing Officer to not allow admission of matters set forth in the two page attachment not given him on 5/16/17 and to prohibit evidence as to offense dates other than 5/5/17. On July 21, 2017, after both parties presented their respective positions in writing, the Hearing Officer, issued a determination that Agency was not permitted to admit into evidence the two pages not originally attached to the Written Notice Grievant received on May 16, 2017. Hearing Officer further determined Agency could not present evidence in support of the disciplinary actions for periods other than May 5th, 2017, the date set forth on the one page Written Notice given Grievant on 5/16/17.³

¹ A. Tabs 1 and 2.

² G. Tab E.

³ G. Tabs F and H.

On July 25, 2017 Agency requested a Compliance Ruling from EEDR concerning the 7/21/17 Determination. On August 6, 2017 EEDR issued Compliance Ruling Number 2018-4590 which concluded:

Based on the foregoing, the hearing officer's order must be vacated. The agency may introduce the attachment to the Written Notice and evidence about offense dates other than May 5, 2017 to show that the discipline was warranted and appropriated under the circumstances.⁴

Pursuant to EEDR's Compliance Ruling, Hearing Officer issued an order vacating his 7/21/17 Determination and indicating Agency was permitted to introduce the two pages of attachments to the Written Notice. Hearing Officer also indicated Agency was also permitted to introduce evidence concerning offense dates set forth in the two attachment to the Written Notice.

Production:

By letter of July 14, 2017 to Agency Grievant requested Agency production of 12 line items of documents. By letter of August 14, 2017 Agency agreed to production of all but two of the twelve line items Grievant requested. Upon both parties being afforded opportunity to present their positions, on September 13, 2017 Hearing Officer ordered production of the two line items objected to by Agency.

Amended Grievance Form A:

On September 6, 2017 Grievant filed an Amended Grievance Form A.

Hearing scheduling:

The parties waived the 35 day period for a hearing to be held and confirmed their waivers by e-mails of 6/28/17. The Grievance Hearing was initially set for 8/16/17 but was continued to 10/25/17 due to matters related to the Hearing Officer's 7/21/17 determination, the request for Compliance Ruling, and issuance of the EEDR Compliance Ruling. On joint motion of the parties, the hearing was continued from 10/25/17 to 12/6/17 due to matters regarding the requested production, the Rapid Eye CD content not being able to be viewed. Furthermore, due to witness issues, the hearing date was continued from 12/6/17 to 12/14/17.

The grievance hearing in this cause was held on December 14, 2017 at Facility. At the conclusion of the Hearing the parties agreed to submit written closing arguments by 5:00 P.M. on December 29, 2017.

Written closing arguments were timely submitted by each party on December 29, 2017.

ISSUES

1. Whether the Grievant engaged in the behavior described in the Written Notice?

⁴ G. Tab G.

2. Whether the behavior constituted misconduct?
3. Whether the disciplinary action taken by the Agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense)?
4. Whether there were mitigating circumstances justifying reduction or removal of the disciplinary action, and if so, whether aggravating circumstances existed that would overcome the mitigating circumstances?

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its action against Grievant was warranted and appropriate under the circumstances. A preponderance of the evidence is evidence which shows that what is intended to be proved is more likely than not; evidence more convincing than the opposing evidence.

Grievant has the burden of raising and establishing any affirmative defenses to discipline and any evidence of mitigating circumstances related to discipline.⁵

HEARING and EXHIBITS

The following appeared at the December 14, 2017 grievance hearing:

- Grievant (who was a witness)
- Grievant's attorney
- Agency advocate
- Agency Party Representative at Hearing (who was a witness)
- Witnesses

Grievant's Exhibits (tabbed A through Z), Agency's Exhibits (tabbed 1 through 11) were admitted, by agreement, *en masse*, and two additional exhibits were admitted at hearing (designated Hearing Exhibits 1 and 2).

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each of the witnesses, the Hearing Officer makes the following findings of fact:

01. At all times relevant to this proceeding, Grievant was employed at as a counselor at Facility, a correctional center operated by Agency. Grievant was classified as a non-exempt, non-security staff, employee. Grievant has been employed at Facility for approximately 10 years having

⁵ Office of Employment Dispute Resolution, DHRM, *Grievance Procedure Manual*, Sections 5.8 and 9.

worked about 5 years as a security officer and 5 years as a counselor. Grievant's work week consisted of working four work days of 10 hours each and his work day was from 6:00 a.m. to 4:30 p.m., with a half hour off for lunch.⁶

02. On May 16, 2017 Grievant was issued a Group III Written Notice with termination for falsification of records. The Written Notice indicated a violation of OP 135.1-*Standards of Conduct* Section V. D.2.B - Falsifying any records, willfully or by acts of gross negligence including but not limited to all electronic and paper work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents.⁷ The Written Notice stated, in pertinent part, in its attachment:

In addition to the review the the Inspector General's office, [Facility] also spot checked your time sheets for the period of time from January 30 through March 31 2017 to rapid eye. Of the 31 days checked, you recorded your start and end times inaccurately every day.

.....

In conclusion, I am issuing you a Group III Written Notice under the Standards of Conduct Policy 135.1 for Falsification of your FLSA Work Period Time Sheets. Per this policy, a single Group III would normally warrant termination. In addition to this written notice, you also have an active Group III Written Notice that will not expire until 2018. Therefore, I am terminating you employment with [Facility] and the Department of Corrections.

03. A Fraud, Waste and Abuse Hotline ("Hotline") complaint was transmitted to the Office of the State Inspector General ("OSIG") alleging Grievant was coming to work late and leaving early every day. The complaint alleged Grievant is at least an hour late for work every day, regularly leaves early, and it is not documented on his time sheet. The complaint also alleged this has been going on for several years.⁸

04. The OSIG referred the Hotline complaint to the Agency Division for investigation. A Division Investigator conduct an investigation beginning in June of 2016 of matters alleged in the complaint and concluded the complaint was "Substantiated". By his May 3, 2017 Memorandum, Investigator notified a number of Agency staff, including Warden at Facility, of his conclusion the complaint was "Substantiated".⁹

⁶ G. Tab I and testimony.

⁷ A. Tab 1 and testimony.

⁸ G. Tab I and testimony.

⁹ A. Tab 7; G. Tab I and testimony.

05. Warden at Facility conducted an investigation into matters addressed in the Division Investigator’s Memorandum of May 3, 2017. During his investigation Warden reviewed, among other matters, weekly Time Sheets Grievant submitted for period January 29, 2017 to April 1, 2017 and compared Time Sheet entries to Rapid Eye video recordings (which are date and time stamped) for the same period. In addition to statements of the IN and OUT times for days worked and other information, the weekly Time Sheets indicated:

<i>Work Period</i>	<i>Hrs. reported worked</i>	<i>Paid leave/holiday</i>	<i>Total Hours of Compensation</i>
1/29/17 through 2/04/17	39.5 hours	0.5 hours	40 hours
2/05/17 through 2/11/17	28.5 hours	11.5 hours	40 hours
2/12/17 through 2/18/17	40 hours	0.0 hours	40 hours
2/19/17 through 2/25/17	30 hours	10.0 hours	40 hours
2/26/17 through 3/04/17	30 hours	10.0 hours	40 hours
3/05/17 through 3/11/17	40 hours	0.0 hours	40 hours
3/12/17 through 3/18/17	39 hours	0.0 hours	40 hours
3/19/17 through 3/25/17	30 hours	10.0 hours	40 hours
3/26/17 through 4/01/17	40 hours	0.0 hours	40 hours ¹⁰

06. Grievant normally worked four ten hour days per week, from 6:00 a.m. to 4:30 p.m., with a one half hour lunch break. Grievant signs, dates, and submits a “FLSA Work Period Time Sheet” (“Time Sheet”) for each 40 hour work period/week. Pursuant to OP 110.1, as a non-exempt, non-security employee, his time sheet is required to be submitted to Human Resources no later than six calendar days following the end of the scheduled work week.¹¹

Grievant states on his weekly time sheet, among other matters, the time he arrived at work (“In”) and the time he left work (“Out”) for each day worked during the 40 hour work period/week. Grievant signs each time sheet which contains the certification, “I certify this is a true and correct report of my time during this period”.¹²

For the period of 1/30/17 through 3/31/17 Grievant’s Time Sheets indicated the following times he arrived at work (“In”) and the following times he left work (“Out”):¹³

Date (2017)	In (A.M.)	Out (P.M.)
Jan. 30	6:40	4:40
Jan. 31	6:00	4:30

¹⁰ A. Tab 7 and Testimony

¹¹ A. Tab 5.

¹² G. Tab K.; A. Tab 7.

¹³ A. Tab 8 and testimony.

Feb. 2	6:00	4:30
Feb. 3	6:00	4:30
Feb. 6	6:10	3:10
Feb. 7	6:00	4:30
Feb. 10	6:00	4:30
Feb. 13	6:00	4:30
Feb. 14	6:00	4:30
Feb. 15	6:00	4:30
Feb. 17	6:00	4:30
Feb. 21	6:00	2:30
Feb. 22	6:00	2:30
Feb. 23	6:15	12:00
Feb. 24	8:00	4:40
Feb. 28	6:00	4:30
Mar. 2	6:00	4:30
Mar. 3	6:10	4:40
Mar. 6	6:15	4:30
Mar. 7	6:00	4:40
Mar. 9	6:00	4:30
Mar. 10	6:00	4:30
Mar. 13	6:00	4:30
Mar. 14	6:15	3:45
Mar. 16	6:00	4:30
Mar. 17	6:00	4:30
Mar. 20	6:00	4:30
Mar. 21	6:10	4:40
Mar. 24	6:00	4:30
Mar. 27	6:00	4:30
Mar. 28	6:00	4:30
Mar. 30	6:00	4:30
Mar. 31	6:00	4:30

07. At the time he was issued this Group III Written Notice, Grievant had one active Group III Written Notice which was issued June 30, 2014.¹⁴

08. Grievant and certain other employees had keys which were secured in a key box which provided an electronic log of the times keys were obtained from or returned to the key box. Grievant key box was in a location that, from Front Entry, required going through a number of gates.¹⁵

¹⁴ A. Tab 6.

¹⁵ Testimony.

09. Rapid Eye electronically monitors and electronically records video of numerous areas throughout Facility including the Front Entry/Front Search area. Rapid Eye video recordings are date and time stamped. Rapid Eye video is kept electronically for a limited period of time.¹⁶

10. By e-mail of June 8, 2016 Agency was notified by Division that Division was in the process of performing an investigation involving Facility in response to a Fraud, Waste, and Abuse Hotline allegation. Agency was also informed the specific nature of the investigation was confidential.¹⁷

CONCLUSIONS

OP 135.1¹⁸

The Department of Corrections, pursuant to Va. Code §53.1-10, has promulgated its own *Standards of Conduct* patterned on the state Standards, but tailored to the unique needs of the Department. The *Standards of Conduct* (Operating Procedure Number 135.1, Effective Date: October 1, 2015) divide unacceptable behavior into three groups according to the severity of the behavior, Group I being the least severe and Group III being the most severe.

Group III offenses include acts and behavior of such a serious nature that a first occurrence normally would warrant termination. § V. (D.)(2.)(b.) of OP 135.1 provides Group III offenses include, but are not limited to, falsifying any records, willfully or by acts of gross negligence including but not limited to all electronic and paper work and administrative related documents generated in the regular and ordinary course of business, such as count sheets, vouchers, reports, insurance claims, time records, leave records, or other official state documents.¹⁹

Group III Written Notices have a four year “active” period from the date the Notice was issued to the employee. Any subsequent Written Notice issued during the “Active” life period of a Group III Written Notice, regardless of level, may result in removal.

Furthermore, § IV. of OP 135.1 provides the list of offenses contained therein is illustrative and not all-inclusive. An action or event occurring either during or outside of work hours that, in the judgment of the agency head, undermines the effectiveness of the employee or of the agency may be considered a violation of these *Standards of Conduct* and may result in disciplinary action consistent with the Operating Procedure based on the severity of the offense.

OP 110.1

¹⁶ Testimony.

¹⁷ G. Tab Q.

¹⁸ A. Tab 4.

¹⁹ G. Tab L.

Operating Procedure 110.1 - *Hours of Work and Leaves of Absence* sets forth the terms of, and conditions for, working hours and leaves of absences for employees of Agency. § IV. (A.)(7)(b.) of OP 110.1 provides:

b. Non-Security Staff:

- i. For the purposes of determining work hours, work begins when the employee arrives at the actual work station (place of performance of essential job functions).
- ii. Unless pick up of keys or equipment is an integral part of the principal duties, that time is not compensable (picking up keys to enter a locked office is not integral).

Falsifying:

Grievant was issued a Group III Written Notice with termination for falsifying FLSA Work Period Time Sheets he signed and submitted to Agency for the period of 1/30/17 to 3/31/17. Falsifying any records, willfully or by acts of gross negligence is addressed in OP 135.1 as a Group III offense. “Falsifying” is not defined in OP 135.1, the DOC Standards of Conduct. The following definition of “Falsify” is found in Black’ Law Dictionary and utilized by the Hearing Officer:

Falsify. To counterfeit or forge: to make something false; to give a false appearance to anything. To make false by mutilation, alteration, or addition; to tamper with, as to falsify a document or record.

Hotline Complaint:

Matters first came to light as a result of a Fraud, Waste and Abuse Hotline (“Hotline”) anonymous complaint received by the Office of the State Inspector General (“OSIG”) concerning Grievant. The complaint addressed matters related to Grievant’s working hours and time sheets.

The OSIG, at its discretion, may conduct an investigation into matters or may assign the investigation to a designated entity. Within Agency, Internal Audit Division (“Division”) is the entity designated for investigation and OSIG assigned the complaint investigation to the Division.²⁰ The Division conducted an investigation under the auspices of, and for, the OSIG. Ultimately a report was tendered to the OSIG by the Division Investigator with certain Agency personnel, including Warden, receiving a synopsis of the Report. Warden and other Agency personnel were notified by the Division

²⁰ Testimony.

Investigator's May 3, 2017 Memorandum that the allegations investigated in the Hotline complaint were "Substantiated".²¹

The Division Investigator was investigating a Hotline complaint. While his investigation gave rise to Agency concerns as to Grievant's time sheets and work hours, discipline was not issued based upon Division Investigator's investigation and his findings but was based upon Warden's investigation and findings. Division Investigator used the discrepancy between the times when Grievant secured or returned his keys (as evidenced by key log entries) and Grievant's time sheets as a basis for his findings. However, these Key Log entry times were not a material element or material consideration of Warden's investigation and his decision to issue discipline.

The evidence indicates Warden's issued discipline based on his finding discrepancies between Grievant's time sheet entries and the time he entered and left Front Search.

Warden's Investigation:

Unlike Division Investigator, who compared time sheet entries to Grievant's key logs, Warden compared Grievant's time sheets to the Rapid Eye video of Grievant at Front Entry. Warden reviewed 9 weekly work sheets Grievant signed and submitted for the period of 1/29/17 through 4/1/17.

Warden's investigation generated a chart comparing various "In" and "Out" times Grievant reported in his time sheets with Rapid Eye video of Grievant at Front Entry for the same time period. The following was extracted from the chart generated in Warden's investigation and summarizes certain, but not all, information in the chart.²²

<i>Comparison of Time Sheet Reported Times and Rapid Eye video recordings (date and time stamped)</i>					
<i>Work Date (2017)</i>	<i>Time in per Time Sheet (A.M.)</i>	<i>Time Arrived at Front Search per Rapid Eye (A.M.)</i>		<i>Time Out per Time Sheet (P.M.)</i>	<i>Time of Departure per Rapid Eye (P.M.)</i>
Jan. 30	6:40	6:50		4:40	4:40
Jan. 31	6:00	5:53		4:30	4:26

²¹ A. Tab 6 and testimony.

²² A. Tabs 8 and 9; G. Tab J.

Feb. 2	6:00	6:11		4:30	4:34
Feb. 6	6:10	6:23		3:10	3:15
Feb. 7	6:00	6:11		4:30	4:36
Feb. 10	6:00	6:16		4:30	4:38
Feb. 13	6:00	6:21		4:30	4:42
Feb. 14	6:00	6:22		4:30	4:44
Feb. 15	6:00	6:38		4:30	4:29
Feb. 17	6:00	6:21		4:30	4:53
Feb. 21	6:00	6:14		2:30	2:40
Feb. 22	6:00	6:23		2:30	2:48
Feb. 23	6:15	6:23		12:00	12:03
Feb. 24	8:00	8:09		4:40	4:41
Feb. 28	6:00	6:08		4:30	4:30
Mar. 2	6:00	6:10		4:30	4:30
Mar. 3	6:10	6:22		4:40	4:47
Mar. 7	6:00	6:12		4:40	4:44
Mar. 9	6:00	6:12		4:30	4:34
Mar. 10	6:00	6:20		4:30	4:43
Mar. 13	6:00	6:19		4:30	4:39
Mar. 14	6:15	6:23		3:45	4:43
Mar. 16	6:00	6:25		4:30	**
Mar. 17	6:00	6:22		4:30	**
Mar. 20	6:00	6:23		4:30	**
Mar. 21	6:10	**		4:40	**
Mar. 24	6:00	6:19		4:30	**
Mar. 27	6:00	6:05		4:30	4:25
Mar. 28	6:00	6:19		4:30	4:38
Mar. 30	6:00	6:13		4:30	**
Mar. 31	6:00	6:19		4:30	**

****** *No viable footage of Rapid Eye - entering/exiting through sallyport*

As a result of Warden's investigation, including the comparisons of the Rapid Eye video and information submitted on Grievant's time sheets, Warden concluded the time sheets Grievant prepared, signed, and submitted to Agency were false.

In viewing daily In and Out times submitted by Grievant on his time sheet there appears to be significant number of days in which a difference is found between the arrival times shown on Grievant's time sheet and shown on Rapid Eye video at Front Search.

Grievant:

Grievant raised a number of issues and concerns as to matters related to his discipline in this cause including:

There being an informal practice of making up time when late.

Confusion as to where the work day starts and ends.

Use of key logs and/or Front Entry to determine where the work day work starts.

He was at work before entering Front Entry.

Unfair/unequal application of policy.

Informal practice:

Grievant contends it was an informal practice at Facility, if an employee came in late to work, the employee could work late to make the time up. Grievant may be attempting to infer this informal practice would also allow the employee to write on his/her time sheet the regular starting time and not the actual time he/or she started work as long as the time was made up however, this is not supported by the evidence.

Grievant also testified that no one ever set down and told him if he put 6:00 down and then arrive at 6:08 that was a big thing. He further indicated and he was just told to be diligent and give Agency 10 hours a day and 40 hours a week.

The evidence indicates an employee's supervisor could allow an employee to make up time if the employee was occasionally late to work. The evidence was clear, even when permitted to work

late to make up for arriving late, this did not authorize or allow the employee to enter inaccurate or false time information on his/her time sheet.

The evidence indicates Grievant's time sheet was required to reflect the actual time arriving at work and the actual time leaving work, even if allowed or authorized to work late to make up for arriving late to work.²³

Directly above the signature line on each "FLSA Work Period Time Sheet" was printed, "I certify this is a true and correct report of my time during this period." Grievant signed each time sheet indicating this certification.

Where work day starts:

Grievant's actual work schedule is not contested. Each work week Grievant works four work days of 10 hours each, from 6:00 a.m. to 4:30 p.m. with a half hour off for lunch.

Grievant contends there is, and has been, confusion as to where an employee is considered to have arrived at work and, thus, the point at which the employee's work day is considered to begin. He contends there are different practices in determining where at Facility the work day is to begin.

For non-exempt Security Staff § IV. (A.)(7.)(a.) of OP 110.1 provides, for the purposes of determining work hours, work begins with muster, when equipment is picked up or when the post is manned, whichever condition is the earliest and authorized. Furthermore work hours end when count is cleared, equipment is turned in, or when relieved from post whichever condition is the latest and authorized.

For non-exempt Non-Security Staff such as Grievant, § IV. (A.)(7.)(b.) of OP 110.1 provides, for the purposes of determining work hours, work begins when the employee arrives at the actual work station (place of performance of essential job functions) or unless pick up of keys or equipment is an integral part of the principal duties, that time is not compensable (picking up keys to enter a locked office is not integral).

²³ Testimony.

An April 18, 2017 memo was sent concerning OP 110.1 which Grievant signed verifying he received a copy of OP 110.1 and discussed it with his supervisor. Grievant raises this as support of his contention there is confusion as to the place he is to arrive at for his work day to begin or end.

The evidence indicates there is confusion as to where, at Facility, the work day is considered to begin and end. The location at which the work day is considered to begin and end has been considered to be:

Where the employee's work station is located; or

Where keys are obtained or returned (the secured key box); or

At Front Entry/Front Search

Division Investigator, in his Hotline complaint investigation, used the place where keys were picked up and returned as where Grievant's work day was considered to began and ended. Grievant raised this was not appropriate as he would often go to chow to visit with inmates or have other duties before getting his keys.

The disciplinary action in this cause was based upon Warden's investigation and findings, not the Division Investigator's findings. Warden indicated the work day began and ended at front entry and based his findings on comparing Grievant's entries on his time sheets with Rapid Eye video of the Front Entry/Front Search area.

Grievant also appears to raise Policy was not followed in Warden's not using the key log record (when he picked up and returned keys) to determine whether his time sheets reflected the actual time he arrived at work or left work. While Warden looked at the key log records showing when Grievant picked up and dropped off his keys he made the decision not to use the key log times in making his determination.

Warden chose to utilize Rapid Eye video recordings of the time Grievant entered and exited Front Entry as the place where work started and ended for a number of reasons. He wanted to take into consideration the time it took Grievant to go from Front Entry to where Grievant's keys were secured and/or to go to where his work station was located. To access his keys Grievant would enter the Front Entry, proceed through Front Search, and proceed through gates into the watch office. Grievant's keys were secured in an electronic key box in the watch office.

Additionally, if considering the work day to begin and end when at his actual work station (place of performance of essential job functions) Warden was concerned this too would not include the time it took Grievant go through front entry and its security procedures, security gates, obtain his keys, and walk to his work station.

Warden, made the decision as a manager, in determining if there were falsification issues in Grievant's time sheet, to use the Front Entry times. He considered using Front Entry times to be a fair and a common practice at Facility. Warden took into consideration using Front Entry time would afford an advantage in Grievant's favor in determining whether there is any discrepancy between actual and reported times as:

Grievant's arrival time would be earlier using the time arriving at Front Entry than it would be if Warden used the time reported in the key log or the time Grievant arrived at his actual work station.

Grievant's time leaving work would be later using the time leaving Front Entry than it would be if Warden used the time he dropped off his keys as reported in the key log or the time he left his actual work station.

Irrespective of whether Grievant's work time started and ended at a.) Front Entry, b.) his work station, or c.) where keys were obtained or dropped off, there would still be a discrepancy with his time sheet. However, any such discrepancy would be less by using the Front Entry.

Grievant told Division Investigator he considered the parking lot to be the location where arrival and departure times were determined. However, Hearing Officer is not persuaded. No evidence was presented indicating the parking lot was considered by management, policy, or other employees as the location where arrival and departure times were determined in reporting hours worked on time sheets.

Audit:

Grievant contends he often actually started work before arriving at Front Entry because he was assigned, for a period of time, to assist Safety Specialist in certain audit functions which required him to go to the Warehouse and the Power Plant. Grievant contends he would, on almost a daily basis for two months, go to Warehouse or Power Plant prior to going to Front Entry.

Grievant called Unit Manager 2 as a witness. Unit Manager 2 was Grievant's supervisor from approximately March or April of 2017 until Grievant left employment. While being supervised by Unit Manager 2 Grievant was not assigned to help with an audit or go to the Warehouse. But before he became Grievant's supervisor, Unit Manager 2 was aware Grievant was going to warehouse for audit work.

Unit Manager 1 supervised Grievant from about July 2016 to about February of 2017. Unit Manager 1 confirmed, around January or February of 2017 he assigned Grievant to assist Safety Specialist concerning an audit project.

Safety Specialist received an e-mail from Unit Manager 1 about February 25th or 26th of 2017 which informed him Grievant was being assigned to help him with some audit work. Safety Specialist was on a different work schedule than Grievant and did not come into work until 8:00 a.m. Safety Specialist was clear indicating Grievant did not assist him with audit matters in February of 2017.²⁴

While Grievant was assigned to assist Safety Specialist, Safety Specialist was not Grievant's supervisor. Safety Specialist testified Grievant was only able to help him a couple of days a week and Grievant worked in the Warehouse from about March 10 to March 29, 2017. Safety Specialist testified Grievant did some work in the Warehouse, but, while he and Grievant discussed duties at the Power Plant, it did not get that far.

The evidence indicates, by a preponderance, Grievant was assigned to work with Safety Specialist and Safety Specialist was first informed of this by e-mail of February 25th or 26th of 2017. Grievant assisted Safety Specialist a couple of days a week from about March 10th to March 29th, 2017. The evidence also indicates Grievant did some work in the Warehouse but did not have duties in the Power Plant.

Rapid Eye and due process:²⁵

Grievant contends due process was violated as, among other matters, his requests to management for access to Rapid Eye camera video was not provided him and he contends "spoliation" of evidence.

²⁴ Testimony of Safety Specialist.

²⁵ Testimony G. Tab R.

Rapid Eye cameras provide video coverage of numerous areas and activities of staff, inmates, and others throughout Facility. By normal business practice and due to storage limitations, Rapid Eye electronically stores video until the video is electronically overwritten by subsequent recordings. The length of time before Rapid Eye video is overwritten varies. HR Manager wasn't sure but opined the video to be available for about a 45 to 60 day period before overwritten.

At his May 5, 2017 meeting with management Grievant requested management allow him to review Rapid Eye video and on May 8, 2017, by e-mail, he requested "access to see the rapid eye camera". No camera video was shown him at the time however, he was shown Rapid Eye video of Front Entry.

No evidence was presented as to what Rapid Eye video was in existence on May 5, 2017, if Rapid Eye video was ever overwritten for any dates at issue in this cause, or, if overwritten, when it was overwritten. No evidence was presented that Grievant requested evidence preservation as to Rapid Eye video.

Grievant did not request the Rapid Eye video for any specific area(s) of Facility but only requested access to see the rapid eye camera. Front Entry Rapid Eye video was available and was provided to Grievant during the hearing process showing him entering and exiting Front Entry. This video was date and time stamped. Grievant contends he should have also able to observe video of a number of locations at Facility including Rapid Eye recordings of the warehouse, power plant, parking lot, and/or other specific areas. However, he did not request Rapid Eye video for any locations.

§2.4 of the Grievance Procedure Manual "Manual" indicates when initiating a grievance, and after initiation, an employee may request from the agency documents related to the actions or omissions grieved. §8.2 of the *Manual* provides, "Absent just cause, all documents relating to the management actions or omissions grieved shall be made available, upon request from a party to the grievance, by the opposing party". §5.7 of the *Manual* authorizes the Hearing Officer to issue orders for the production of documents. Furthermore, once a grievance is initiated, a party may, as provided in §6.1 and §6.3 of the *Manual*, challenge any party noncompliance seeking a ruling or hearing officer decision on matters.

The Group III Written Notice with termination was issued on May 16, 2017. By letter dated June 8, 2017 counsel for Grievant filed a dismissal grievance submitting his Grievance Form A and Hearing Officer was appointed effective June 28, 2017.

On July 14, 2017, Grievant requested Agency produce 12 numbered line items of documents and Rapid Eye video recordings. Three of the 12 numbered line items requested production of Rapid Eye video footage, to-wit:

- #1. Rapid Eye Footage of Grievant's entry and exit into the institution on May 5, 2017;
- #2. Rapid Eye Camera Footage of Grievant's entry and exit into the institution on any other date that Agency alleges Grievant falsified his time records.
- #10. Copies of Rapid Eye footage of Front Search entry and exit of the institution from 5:45 a.m. to 6:30 a.m. and from 5:45 p.m. to 6:30 p.m. on May 1 to May 8, 2017 and the corresponding day shift and night shift duty rosters for security personnel from each date.

By letter of August 14, 2017 Grievant's attorney indicated all but item #10 and one numbered line item not addressing Rapid Eye video were produced at his office on August 9, 2017. Subsequently, on motion of Grievant's attorney, Hearing Officer ordered the two numbered items not produced by Agency (including #10 re: Rapid Eye footage as described above) be produced. As ordered, Agency produced said items. No other request for production of Rapid Eye video was made to the Hearing Officer. No other claims of party noncompliance were made. No requests for production of Rapid Eye video made to Hearing Officer were denied in this cause.

§V. B. of the Rules for Conducting Grievance Hearings provides:

Although a hearing officer does not have subpoena power, he or she has the authority to and may draw adverse factual inferences against a party, if that party, without just cause, has failed to produce relevant documents, has failed to make available relevant witnesses as the hearing officer or EDR had ordered, or against an agency that has failed to instruct material agency employee witnesses to participate in the hearing process. Under such circumstances, an adverse inference could be drawn with respect to any factual conflicts resolvable by the ordered documents or witnesses.

Although Virginia law recognizes a "spoliation or missing evidence inference," (*Wolfe v. Va. Birth-Related Neuro. Injury Comp. Program*, 40 Va. App. 565, 580-81, 580 S.E.2d 467, 475 (2003)), that law treats it as a mere permissible inference rather than a true presumption (*Jacobs v. Jacobs*, 218 Va. 264, 269, 237 S.E.2d 124, 127 (1977)). See *Rahnema v. Rahnema*, 47 Va. App. 465, 626

S.E.2d 448 (2006) (footnote 12). This inference can be weighed with all of the other evidence in any case.

Due process violations prior to the appointment of the Hearing Officer were alleged. As has been stated in a number of EEDR Compliance Rulings, including EEDR Compliance Ruling No. 2018-4590 issued on 8/16/17, EEDR has consistently held that the extensive post-disciplinary due process provided through the grievance procedure will cure a lack of pre-disciplinary due process. While EEDR recognizes that not all jurisdictions have held that pre-disciplinary violations of due process are cured by post-disciplinary actions, EEDR has held it is persuaded the reasoning of the many jurisdictions that have held that a full post-disciplinary hearing process can cure any pre-disciplinary deficiencies.²⁶

Grievant has been provided post-disciplinary due process. After receiving a complete copy of the three page Written Notice, Grievant received a full hearing before an impartial decision-maker; an opportunity to present evidence; an opportunity to confront and cross-examine the agency witnesses in the presence of the decision-maker; and an opportunity to have counsel present.

As discussed above, and consistent with EEDR Compliance Ruling 2018-4590 addressing extensive post-disciplinary due process provided through the grievance procedure will cure a lack of pre-disciplinary due process, Hearing Officer does not find a violation of due process.

Furthermore, for the reasons stated above, Hearing Officer finds there is insufficient evidence to find spoliation and/or warrant making an adverse inference as argued by Grievant. Even if the inference were to be found to apply in this cause the Hearing Officer only has the duty, as trier of fact, to consider it along with all other facts in evidence and reasonable inferences arising from them.

Mitigation and Unfair/unequal application of policy:

§ 2.2-3005 of the Code of Virginia provides Hearing Officers shall have the power and duty to receive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by the Department of Human Resource Management pursuant to § 2.2-1202.1.

²⁶ EEDR Compliance Ruling Number 2018-4590 August 16, 2017.

The hearing officer is to determine whether the agency has proven by a preponderance of the evidence that the disciplinary action was warranted and appropriate under the circumstances. To do this, the hearing officer reviews the evidence de novo (afresh and independently, as if no determination had yet been made) to determine (i) whether the employee engaged in the behavior described in the Written Notice; (ii) whether the behavior constituted misconduct; and (iii) whether the disciplinary action taken by the agency was consistent with law (e.g., free of unlawful discrimination) and policy (e.g., properly characterized as a Group I, II, or III offense). If the hearing officer finds that (i) through (iii) above, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the discipline exceeds the limits of reasonableness.

If the agency prevails on all three elements, the hearing officer must then consider whether the Grievant has shown, by a preponderance of the evidence, that there were nevertheless mitigating circumstances justifying a reduction or removal of the disciplinary action, and if so, whether any aggravating circumstances exist which would overcome the mitigating circumstances. Furthermore, in reviewing agency-imposed discipline, the hearing officer must give due consideration to the management's right to exercise its good faith business judgment in employee matters, and the agency's right to manage its operations.

Whether the discipline is consistent with the agency's treatment of other similarly situated employees is addressed in Section VI.(B)(2) of the Rules and presented as an example of "mitigating circumstances" to be considered by the hearing officer.

Grievant contends an unfair/unequal or misapplication of policy in that Manager received a Group II for failure to follow instructions and/or policy in the later part of 2016 for matters related to his reporting of time on his time sheet while he received a Group III for falsification.

The evidence indicates that Manager received a Group II Written Notice. Management noted on the Written Notice it could issue Manager a Group III Written Notice for falsification but due to mitigating factors chose to issue a Group II instead.²⁷ The Group II Written Notice stated, under *Nature of Offense*:

Upon review of your time and attendance sheets, it was determined that several errors had occurred in your hours worked. You stated in the due process meeting that it was entirely your fault, and it was not intentional. Due to your honesty and good work performance, I am issuing you a Group II Written Notice for Failure to Follow policy to accurately record your time and attendance.

²⁷ Hearing Exhibit 2.

Manager's Written Notice further described circumstances or background information used to mitigate or support the disciplinary action (Section IV - Circumstances considered) as follows:

I could issue you a Group III Written Notice (Falsification) but due to mitigating factors, I have decided to issue a Group II written Notice instead. I also have taken into consideration your lack of understanding of how to complete the time and attendance record. I considered your tenure of approximately 1^{1/2} years and otherwise good job performance.

The evidence indicates Manager was supposed to be filing his time sheets each week but was filling them out two or three weeks late. He admitted to management his responsibilities and stated to management his actions were unintentional. Moreover, Manager did not have any active disciplinary actions when issued the Group II.

Manager and Grievant were not similarly situated employees. Grievant had one active Group III Written Notice and Manager did not have any active Written Notices. The evidence also indicates management had mediated Grievant's previous Group III Written Notice issued June 30, 2014 as his employment was not terminated at that time. Policy provides the active life of a Group III offense is 4 years from the time it was issued and also provides any group notice received while a Group III is active, regardless of level, may result in removal.

In reviewing requested Rapid Eye video for the period of 5/1/17 to 5/8/17 Grievant raises the video shows security officers leaving early and not being disciplined as he was. Grievant testified Count clears at 5:57. However, when Lieutenant knows count is right he releases the security officers.

The parties entered into a formal stipulation concerning the testimony of two Sergeants who were assigned to the 5:45 PM to 6:15 AM Night Shifts on the dates of 5/1/17 through 5/8/17. The Parties stipulated to the following regarding their testimony of two Sergeants:

- a. On the date of 5/4/17 several unnamed night shift officers left the compound at 5:52 AM, a supervisor was present when they left and they were signed out at 6:00 AM. This would have been recorded on the duty roster dated 5/3/17 for the night shift.

b. On the date of 5/5/17 several unnamed night shift officers left the compound at 5:55 AM, a supervisor was present when they left and they were signed out at 6:00 AM. This would have been recorded on the duty roster dated 5/4/17 for the night shift.

c. On the date of 5/6/17 some night shift officers began leaving as early as 5:45 AM, the bulk of the night shift officers exited the compound at 5:54 AM, a supervisor was present and they were signed out at 6:00 AM. This would have been recorded on the duty roster dated 5/5/17 for the night shift.

d. On the date of 5/7/17 some unnamed night shift officers left the compound as early as 5:50 AM, the bulk of the night shift officers exited the compound at 5:53 AM, a supervisor was present and they were signed out at 6:00 AM. This would have been recorded on the duty roster dated 5/6/17 for the night shift.

e. On the date of 5/8/17 several unnamed night shift officers left the compound at 5:50 AM, a supervisor was present and they were signed out at 6:00 AM. This would have been recorded on the duty roster dated 5/7/17 for the night shift.

Grievant contends an unfair/unequal or misapplication of policy in that security staff's work time was not being accurately reported/recorded and security staff were not disciplined as he was. However, the evidence does not indicate the circumstances as to security staff and Grievant are the same or similar. Grievant is non-security staff and he personally filled out, signed, and submitted to management his own Time Sheets. On each time sheet Grievant signed the statement, "I certify this in a true and correct report of my time during this period."

Security staff was required to remain at Facility at the end of their shift until count cleared and the new shift appears. For security staff, § IV. (A.)(7.)(a.) of OP 110.1 provides, for the purposes of determining work hours, work begins with muster, when equipment is picked up or when the post is manned, whichever condition is the earliest and authorized. Furthermore work hours end when count is cleared, equipment is turned in, or when relieved from post whichever condition is the latest and authorized. Security staff do not sign and submit their own time sheets.

Upon review of all evidence admitted in this cause, the Hearing Officer finds Grievant engaged in the behavior described in the Group III Written Notice, his behavior constituted misconduct, and Agency's discipline was consistent with law and policy. Furthermore, the Hearing Officer finds, under the record evidence, that the discipline does not exceed the limits of reasonableness and mitigation is not found to be warranted and appropriate under the circumstances.

DECISION

For the reasons stated above, based upon consideration of all the evidence presented in this cause the Hearing Officer finds:

1. Grievant engaged in the behavior described in the Written Notice.
2. The behavior constituted misconduct.
3. The disciplinary action taken by the Agency was consistent with law and policy.
4. Mitigating circumstances justifying reduction or removal of the disciplinary action are not found.
5. Agency has met its burden that the action against Grievant was warranted and appropriate under the circumstances.

For the reasons stated above, based upon consideration of all the evidence presented in this cause, the Agency's issuance to Grievant of a Group III Written Notice with termination is **Upheld**.

APPEAL RIGHTS

You may request an administrative review by EEDR within 15 calendar days from the date the decision was issued. Your request must be in writing and must be **received** by EEDR within 15 calendar days of the date the decision was issued.

Please address your request to:

Office of Equal Employment and Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You must also provide a copy of your appeal to the other party and the hearing officer. The hearing officer's decision becomes final when the 15-calendar day period has expired, or when requests for administrative review have been decided.

A challenge that the hearing decision is inconsistent with state or agency policy must refer to a particular mandate in state or agency policy with which the hearing decision is not in compliance. A challenge that the hearing decision is not in compliance with the grievance procedure, or a request to present newly discovered evidence, must refer to a specific requirement of the grievance procedure with which the hearing decision is not in compliance.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 days of the date when the decision becomes final. *(Agencies must request and receive prior approval from EEDR before filing a notice of appeal.)*

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EEDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EEDR Consultant].

S/ Lorin A. Costanzo

Lorin A. Costanzo, Hearing Officer

copies e-mailed to:
Grievant's Attorney
Agency's Advocate
EDR